

broker.¹⁷ *Id.* The Commission stated, therefore, that these circumstances clearly provided an environment “conducive to the unauthorized transfer of control of the brokered station.” *Id.*

Nevertheless, based on the totality of the evidence, the Commission concluded that permittee had not relinquished ultimate control of its station. *Id.* The record reflected that the permittee had paid all station expenses and hired its own two employees. *Id.* at 8541-42. In addition, although the LMA obligated the permittee to pay all costs of station operation, it was entitled to be reimbursed for such expenses by the broker as part of the \$1,000 monthly payment for “reasonable and prudent” expenses.¹⁸ The Commission noted that this amount was “substantially more” than the \$20 per month that was netted by the licensee in *Salem Broadcasting, Inc.*, 6 FCC Rcd 4172 (MMB 1991), and, thus, did not reflect that the permittee lacked control of station finances. *Id.* at 8541. The Commission also found that although the \$1,000 monthly LMA payment constituted the permittee’s sole source of funding for the term of the programming arrangement, the LMA was not atypical of such contractual arrangements whereby airtime is made available to a broker in exchange for consideration which incorporates a station’s fixed and operating costs plus a built-in profit. *Id.*, citing *WGPR, Inc.*, 10 FCC Rcd 8140, 8145 (1995).¹⁹

¹⁷ The permittee neglected to disclose the fact that its chief operator was an employee of the timebroker/purchaser in its initial responses to a petition to deny. *Id.* at 8540.

¹⁸ The LMA placed no limit on what expenses the permittee could incur. *Id.* at 8541 n.13.

¹⁹ The Commission quoted the following language from *WGPR*:

So long as the time brokerage arrangement is one which retains the ultimate decision-making authority in the licensee, the receipt of [a monthly payment] does not amount to an abdication of its control over finances We caution licensees engaged in time brokerage arrangements, however, that they must

(continued...)

Choctaw is instructive with respect to the facts in this proceeding. MMBI, like the permittee in *Choctaw*, has paid all of the construction and operating expenses of WJUX. MMBI also hired its own General Manager and Public Affairs Director, neither of whom has any employment relationship with Jukebox Radio. MMBI also receives monthly payments under the Affiliation Agreement which are sufficient to cover the station's operating expenses and provide a built-in profit of 15-20%. See Tr. 1345, 1354-64. As in *Choctaw*, these payments are substantially more than the \$20 per month netted by the licensee in *Salem Broadcasting*, and, thus, do not demonstrate that MMBI lacks control of station finances. Moreover, MMBI has sufficient control of WJUX's finances that it was able to dictate to the broker that the monthly payments under the Affiliation Agreement would be increased by approximately \$100 per month in order to cover the capital costs associated with MMBI's purchase of additional equipment. Furthermore, unlike the situation in *Choctaw*, Turro/Jukebox Radio is not a prospective purchaser of WJUX, nor does Turro own the equipment that is used in the operation of the station, all of which is owned by MMBI.

As in *WGPR, Inc.* and *Choctaw*, Jukebox Radio's monthly payments under the Affiliation Agreement constitute MMBI's sole source of funding during the term of that agreement. The amended Affiliation Agreement is substantially similar to LMAs previously approved by the Commission, and represents a typical contractual arrangement involving the sale of airtime to a

¹⁹(...continued)

operate . . . as a stand-alone entity discrete from the broker. Thus, we require that licensees must maintain their own bank accounts, pay the salaries of their own employees, and remain responsible for their own obligations to programmers, utility companies, and other operational matters. In other words, the licensee should be ready to operate independently from the broker at any time it believes the arrangement does not fulfill its public interest obligations.

Id. at 8541, quoting *WGPR, Inc.*, 10 FCC Rcd at 8145.

broker in exchange for consideration which incorporates the station's fixed and operating costs as well as a built-in profit. Therefore, because MMBI has maintained its own bank account, paid the salaries of its own employees, remained responsible for its financial obligations to other entities, and is prepared to operate independently from Jukebox Radio at any time it believes the Affiliation Agreement does not fulfill its public interest obligations, the Bureau has failed to establish that MMBI has relinquished ultimate decision-making authority over WJUX. *WGPR, Inc.*, 10 FCC Rcd at 8145; *Choctaw*, 12 FCC Rcd at 8541.

Neither Revocation of the WJUX Construction Permit Nor a Forfeiture Is Warranted.

MMBI maintains that the record would not support the conclusion that it abdicated control of WJUX. Even assuming, *arguendo*, the Presiding Judge were to determine that MMBI relinquished ultimate decision-making authority over WJUX, the record in this proceeding does not warrant the draconian measure of revocation of the WJUX construction permit. Indeed, the Commission has not sought the revocation of a construction permit in other proceedings involving allegations of a violation of Section 310(d) of the Communications Act, even in cases involving facts which are substantially more egregious than those in this proceeding.

For example, in *Western Slope Communications, Ltd.*, 12 FCC Rcd 7965 (MMB 1997), the Bureau was confronted with allegations regarding the unauthorized transfer of control of the construction permit for Station K27CO, Grand Junction, Colorado. In that case, Western Slope Communications, Ltd. ("Western Slope"), entered into an "Agreement" with a prospective purchaser of the station, one Russell Withers,²⁰ concerning the construction and operation of the proposed

²⁰ Withers is the licensee of several Colorado television stations, including Station KREX-TV, Grand Junction, and Station KREG-TV, Glenwood Springs. 12 FCC Rcd at 7966

station. Under the Agreement, Withers constructed the station at his own expense, and located the station's transmitter and main studio at sites which he owned. Withers also maintained control over all aspects of station operation, including financial arrangements, personnel decisions, station policy, and programming. Although Western Slope claimed that Withers' actions were "subject to [its] ultimate direction and control," the permittee could provide no evidence of, nor could the Bureau identify, significant responsibilities that had been retained or performed by Western Slope. Indeed, Western Slope's bankruptcy counsel and self-appointed "*de facto* managing agent" stated that his activities had been limited to collection and deposit of amounts paid under the Agreement, execution of income tax returns for the permittee, and the execution of FCC applications and other documents necessary to preserve the construction permit.²¹ *Id.* at 7966.

On the basis of these facts, the Bureau concluded that, from the time the permit was issued in July 1991 until the issuance of its letter ruling on January 28, 1997, Western Slope and Withers had violated Section 310(d) of the Act by transferring and assuming control, respectively, of Station K27CO without prior Commission authorization. Rather than revoking the permit, however, the Bureau assessed a forfeiture against both Western Slope and Withers in the amount of \$5,000 for their "willful and repeated violations" of Section 310(d) of the Communications Act and Section 73.3540 of the Commission's rules. In assessing these forfeitures, the Bureau noted that it had (i) applied the relevant statutory factors, including "the nature, extent and gravity of the violation," and

²⁰(...continued)
n.2.

²¹ The Bureau noted that it had received information raising questions concerning the viability of Western Slope as a functioning legal entity, and whether its self-appointed "*de facto* managing agent" had authority to act for Western Slope in connection with the FCC's processes. *Id.* at 7967.

(ii) reviewed similar cases and considered the fact that the forfeitures assessed in those cases involved violations by full-powered stations, which were likely to generate revenues far greater than the LPTV station.²² *Id.*

In this case, the conduct of Weis/MMBI, assuming *arguendo* it could be found to have resulted in an abdication of control of WJUX, has been substantially less egregious than that reflected in *Western Slope Communications*. Unlike Western Slope, which relinquished control over all aspects of the construction and operation of its station, MMBI has been financially responsible for the construction and operation of WJUX. Moreover, Weis provided a personal guaranty in connection with MMBI's transmitter site lease, and its lease for WJUX's main studio and office space. Weis also has exercised supervisory control over the station's programming and personnel. Furthermore, Weis entered into a programming arrangement which he believed had the advance approval of the Chief of the Mass Media Bureau. Thus, the record reflects that Weis relied on the Bureau's declaratory ruling and acted in good faith in operating WJUX in accordance with that ruling. Therefore, in the event the Presiding Judge were to find, contrary to MMBI's proposed conclusions, that MMBI nevertheless relinquished control of WJUX, because MMBI is substantially less culpable than the parties in *Western Slope Communications*, the Commission should not revoke the WJUX construction permit.

²² Withers had originally planned to rebroadcast Station KREG-TV's programming on Station K27CO, but later changed his mind. At the time the Bureau issued its letter ruling, K27CO was operating as an independent television station, airing Fox and other programming, and was being carried on a local cable system. *Id.* at 7966 n.2.

III. The Bureau Failed to Establish that MMBI Misrepresented Facts and/or Lacked Candor Concerning the Operation of Station WJUX.

The Bureau claims that there is “compelling and overwhelming evidence that MMBI repeatedly and intentionally misrepresented facts” and/or lacked candor with the Commission concerning the operation of WJUX and its relationship with Turro and Jukebox Radio. Bureau Findings, ¶187. Although Weis provided all the funds used to purchase, construct, and operate WJUX, the Bureau claims that, because he did not disclose until the hearing that WJUX’s only source of revenue was the payments made by Turro under the Affiliation Agreement, Weis lacked candor when he stated he was financially responsible for WJUX’s expenses. *Id.* at ¶190. In addition, although Weis testified that he has always controlled what is broadcast on WJUX, the Bureau contends that Weis never exercised meaningful control over the station’s programming. *Id.* at ¶191. According to the Bureau, Weis used MMBI’s July 27, 1995, response to the Bureau’s letter of inquiry, dated June 21, 1995 (“LOI”), and the amended Affiliation Agreement to create the impression that he was more involved in the operation of WJUX than actually was the case. *Id.* at ¶193. The Bureau therefore concludes that Weis serves only as a “straw man” for Turro, and that any representations to the contrary by Weis constitute misrepresentation and/or lack of candor. *Id.* at ¶194.

In much the same manner, Universal contends that Weis is nothing but a front for Turro. Universal Findings, ¶75. Universal claims that although Blabey and Montana may have management titles, “they do not perform any meaningful management functions” at WJUX. *Id.* Universal also claims that there is no “substantial evidence” that Weis ever exercised “meaningful control” over WJUX’s programming. *Id.* Moreover, although Universal admits that Weis/MMBI have “direct

financial responsibility” for the station, Universal claims that “essentially all MMBI revenue is derived from Turro,” and Turro has indirectly paid for the purchase, construction, and operation of WJUX, which includes a return on Weis’ investment in the station. *Id.* Universal concludes that, to the extent Weis/MMBI attempted to overstate Weis’ role in controlling WJUX and downplayed the role of Turro, Weis “must be found to have lacked basic candor before the Commission.” *Id.* at ¶76.

As illustrated above, the allegations of the Bureau and Universal are substantially the same as those presented under the transfer of control issue. In essence, the Bureau and Universal claim that because, in their view, Weis/MMBI did *not* control WJUX’s finances and programming, and Weis has contended throughout this proceeding that he controlled all aspects of WJUX’s operation, that Weis/MMBI necessarily misrepresented facts and/or lacked candor in representing to the Commission that Weis controlled WJUX.

As demonstrated in Section II above, although there has been an ongoing business relationship between Weis/MMBI and Turro/Jukebox Radio through the Affiliation Agreement and the rebroadcasting of WJUX’s signal on Turro’s Pomona and Fort Lee translator stations, Weis has controlled all aspects of WJUX’s operation from the time he acquired the construction permit. The relevant facts regarding WJUX’s finances, programming, and personnel have been set forth in MMBI’s Findings and Section II above, and will not be reiterated herein. Nevertheless, even assuming, *arguendo*, that the Presiding Judge were to find that Weis has not always retained ultimate control over WJUX’s finances and/or programming, the Bureau failed to meet its burden of establishing that MMBI misrepresented facts and/or lacked candor before the Commission because

there is no evidence in the record to suggest that Weis intended to deceive the Commission concerning his role with respect to WJUX.²³

As demonstrated in MMBI's Findings at ¶61, Weis understood that the Bureau's declaratory ruling expressly authorized the licensee of a translator station to furnish programming and advertising to an FM station, and also rebroadcast the FM station's signal on the translator. MMBI Ex. 1, p. 1; Tr. 1385-86. Indeed, Weis elected to proceed with the acquisition of the WJUX construction permit and enter into the Affiliation Agreement because he believed it was a good business opportunity and the overall arrangement had been specifically approved in advance by the Chief of the FCC's Mass Media Bureau. MMBI Ex. 1, p. 2; Tr. 1345-47, 1392. Moreover, at footnote 13 of the *HDO*, the Commission stated that although it found the Affiliation Agreement and actual business relationship between Turro and WJUX to be in violation of Section 74.1232(d) of the Commission's rules, it was "not unreasonable" to contend that the Bureau's declaratory ruling authorized the business relationship between Turro and WJUX. *HDO*, 12 FCC Rcd 6264, 6269-70, n.13 (1997).

Furthermore, the record reflects that, despite (i) the Commission's April 13, 1995, inspection of WJUX's main studio, (ii) Weis' receipt of the LOI, dated June 21, 1995 (which made no reference to the inspection), and (iii) Weis' receipt of a letter dated April 5, 1996, which was signed by the Chief of the Mass Media Bureau (MMBI Ex. 1, pp. 3-4); Weis was never informed by the Commission that, in the Commission's opinion, WJUX's operations and/or facilities did not comply with the FCC's requirements until two years after the inspection when the *HDO* was issued in April

²³ See *MCI Telecommunications Corporation*, 3 FCC Rcd 509, 512 (1988) (misrepresentation or lack of candor cannot be found in the absence of a showing of "deceptive intent"), quoting *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983).

1997. *Id.* Indeed, although the letter dated April 5, 1996, from the Chief of the Mass Media Bureau noted that an inspection had been conducted, it gave no indication that the operation of WJUX had been found to be in violation of any FCC rule or policy. MMBI Ex. 1, pp. 3-4. More importantly, however, the letter expressly permitted the continuation of the arrangement between MMBI and Turro whereby Jukebox Radio provided programming and advertising to WJUX pursuant to the Affiliation Agreement, provided that Turro would cease rebroadcasting WJUX over his translator stations.²⁴ *Id.* Bur. Ex. 1, pp. 11-13.

The above facts are significant because they demonstrate that Weis had no motive to misrepresent facts or lack candor in MMBI's dealings with the Commission because, as far as he was concerned, he was operating WJUX in complete compliance with the FCC's rules and the Bureau's November 19, 1991, declaratory ruling. As demonstrated herein, (1) Weis had entered into the Affiliation Agreement, an arrangement which he believed had been approved in advance by the Chief of the FCC's Mass Media Bureau; (2) WJUX was operating in accordance with the Bureau's declaratory ruling; (3) Weis had hired a full-time general manager and staff person who were present at the WJUX main studio during normal business hours; (4) Weis was solely responsible for

²⁴ As demonstrated in MMBI's Conclusions at ¶¶52-55, the Bureau's letter of April 5, 1996, falls far short of meeting the requirements of Section 558(c) of the Administrative Procedure Act ("APA"). Section 558(c) of the APA requires that, except in cases of willfulness or those in which the public health, interest or safety requires otherwise, the revocation of a license (or in this case, a construction permit) is lawful only if, before agency revocation proceedings are initiated, the licensee has been given (1) written notice of the facts or conduct which may warrant the action; and (2) an opportunity to demonstrate or achieve compliance with all lawful requirements. 5 U.S.C. §558(c). Neither the Bureau's June 21, 1995, LOI nor its April 5, 1996, letter provided MMBI with the requisite legal notice. On the contrary, by expressly permitting Jukebox Radio to continue providing substantially all of the programming and advertising for WJUX, the Bureau's letter of April 5, 1996, effectively assured MMBI that the operation of WJUX was in complete compliance with the Commission's rules.

WJUX's finances, which required him to provide a personal guaranty for the tower lease agreement and MMBI's lease for studio and office space at its Ferndale, New York, studio location; and (5) in addition to ensuring that Jukebox Radio would provide programming to WJUX pursuant to the Affiliation Agreement, Weis personally had directed his general manager to come up with ideas for public affairs programming designed to serve the needs and interests of the residents of Monticello, New York, and the surrounding area.

The only matter in the record with respect to which Weis or MMBI made representations to the Commission that proved to be inaccurate or incomplete concerns Weis' representations in MMBI's July 27, 1995, response to the Bureau's LOI regarding WJUX's local telephone service. As shown in MMBI's Proposed Findings and Conclusions (Findings, ¶¶47-55 and 97-98; Conclusions ¶¶40-50), this record does not support a conclusion that Weis acted with deceptive intent in making his response concerning local telephone service.

In light of the undisputed record evidence set forth above, the Bureau failed to meet its burden of demonstrating that MMBI misrepresented facts and/or lacked candor with the Commission concerning the operation of Station WJUX. Therefore, Issue 7 should be resolved in MMBI's favor.

IV. Conclusion.

As demonstrated herein, the Bureau failed to establish that MMBI violated Sections 73.1120 and 73.1125(a) and (c) of the Commission's rules with respect to maintaining a main studio for Station WJUX. The record establishes that MMBI has been able to originate programming from its main studio since it commenced operation. Moreover, the employment of Blabey and Montana satisfies the Commission's requirement of maintaining a "meaningful management and staff

presence.” WJUX has broadcast programming serving Monticello and Sullivan County. The Bureau and Universal have not shown that there is any need or interest of the WJUX service area not met by the WJUX’s programming.

The Bureau also failed to establish that MMBI engaged in an unauthorized transfer of control of Station WJUX in violation of Section 310(d) of the Communications Act and Section 73.3540 of the Commission’s rules. The evidence reflects that Weis has always retained ultimate decision-making authority over WJUX by exercising control over its finances, programming, and personnel. The record also establishes that MMBI is prepared to operate independently of Jukebox Radio at any time it believes the Affiliation Agreement does not fulfill its public interest obligations. Nevertheless, assuming, *arguendo*, the Presiding Judge were to find that MMBI abdicated control of WJUX, MMBI was entitled to rely on the Bureau’s declaratory ruling, and the evidence establishes that MMBI relied on that ruling in good faith. Therefore, revocation of the WJUX construction permit is not warranted. MMBI also firmly believes that a forfeiture is not warranted on the record in this proceeding.

Finally, the Bureau failed to establish that MMBI misrepresented facts and/or lacked candor in this proceeding. There is no evidence that MMBI acted with an intent to deceive the Commission with respect to any matter concerning the operation of WJUX. The Bureau and Universal argue that Weis engaged in an unauthorized transfer of control of WJUX, and that Weis did not provide WJUX with a main studio attended by an adequate management and staff presence. The Bureau and Universal also claim that for Weis to have maintained and contended otherwise constitutes misrepresentation. They are wrong. Even if, as it should not be, it were concluded that Weis is wrong in his contentions, it is clear that Weis believed, in good faith, that he did not transfer or

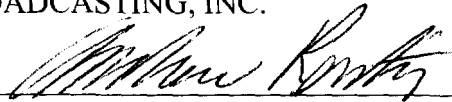
abdicate control of WJUX, and that he maintained a sufficient main studio supported by adequate personnel. To conclude against Weis and MMBI on either Issue 5 or 6 would not warrant a conclusion that Weis and MMBI had, therefore, lacked candor or made misrepresentations to the Commission.

As demonstrated above, Issues 5, 6, and 7 should be resolved in MMBI's favor. As a result, Issue 8 also should be resolved in the permittee's favor because MMBI possesses the requisite qualifications to be a Commission licensee.

WHEREFORE, in light of the foregoing, Monticello Mountaintop Broadcasting, Inc. respectfully requests that the issues designated against it be resolved in ITS FAVOR.

Respectfully submitted,

MONTICELLO MOUNTAINTOP
BROADCASTING, INC.

By: 

James P. Riley
Andrew S. Kersting

Its Counsel

Fletcher, Heald & Hildreth, P.L.C.
1300 N. Seventeenth Street, 11th Floor
Arlington, Virginia 22209
(703) 812-0400

April 3, 1998

c:\ask...riley\pleading\monticel.rep

ATTACHMENT

Koteen & Naftalin Cover Letter, Dated July 28, 1995,
Under Which MMBI's Response to the Goldstein Inquiry
Was Tendered to the Commission

LAW OFFICES
KOTEEN & NAFTALIN
1150 CONNECTICUT AVENUE
WASHINGTON, D.C. 20036

BERNARD KOTEEN
ALAN Y. NAFTALIN
RAINER K. KRAUS
ARTHUR B. GOODKIND
GEORGE Y. WHEELER
HERBERT D. MILLER, JR.
MARGOT SMILEY HUMPHREY
PETER M. CONNOLLY
M. ANNE SWANSON
CHARLES R. NAFTALIN
GREGORY C. STAPLE
MORTON J. POSNER

TELEPHONE
(202) 467-5700
TELECOPY
(202) 467-5915

July 28, 1995

Mr. Norman Goldstein, Chief
Complaints & Investigations Branch
Enforcement Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

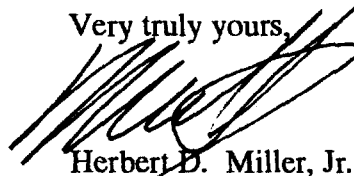
Dear Mr. Goldstein:

Transmitted herewith, on behalf of Monticello Mountaintop Broadcasting, Inc., the permittee of FM radio station WJUX(FM), in Monticello, New York, is a response to your letter of June 21, 1995 concerning the operation of that station.

Your letter of June 21, 1995 requested a response by July 21, 1995. However, on July 20, 1995, you granted an informal request for an extension of time through today.

In the event there are any questions concerning this matter, please communicate with this office.

Very truly yours,



Herbert D. Miller, Jr.

cc w/ enc Mr. Wesley R. Weis

CERTIFICATE OF SERVICE

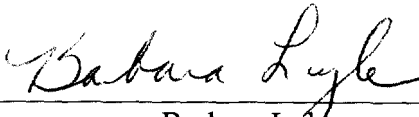
I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 3rd day of April, 1998, copies of the foregoing "Reply Findings of Monticello Mountaintop Broadcasting, Inc." were mailed first-class, postage prepaid, to the following:

The Honorable Arthur I. Steinberg*
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W., Room 228
Washington, DC 20554

Alan Aronowitz, Esquire*
Hearing Branch
Enforcement Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W., Room 7212
Washington, DC 20554

Charles R. Naftalin, Esquire
Koteen & Naftalin
1150 Connecticut Avenue, N.W.
Washington, DC 20036
Counsel for Gerard A. Turro

Richard A. Helmick, Esquire
Cohn and Marks
1920 N Street, N.W.
Suite 600
Washington, DC 20036
Counsel for Universal Broadcasting of New York, Inc.



Barbara Lyle

* By Hand Delivery